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H.R. 3313 WOULD VIOLATE THE CONSTITUTION, PLACE CONGRESS ABOVE THE FEDERAL JUDICIARY, AND SET A DANGEROUS PRECEDENT

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At the request of a broad coalition of civil rights, religious, legal, and professional organizations, we have prepared the following analysis of H.R. 3313, the "Marriage Protection Act of 2004," which would add a new § 1632, entitled "Limitation on Jurisdiction," to Title 28 of the United States Code:

> No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.

Section 1738C, added to Chapter 115 of Title 28 by the "Defense of Marriage Act," Pub. Law 104-199, § 2(a), 110 Stat. 2419 (1996), provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. [28 U.S.C. § 1738C]

Section 1738C was intended, according to its proponents, to free states from their constitutional obligation to give "full faith and credit" to marriages of same-sex couples recognized by other states. H.R. Rep. No. 664, 104th Cong., 2d Sess. 23 (1996) (in the event any State permits same-sex couples to marry, "other States will not be obligated or required, by operation of the Full Faith and Credit Clause of the United States Constitution, to recognize that marriage, or any right or claim arising from it"). The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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DISCUSSION

1. H.R. 3313 would violate the Equal Protection Clause.

"The concept of equal justice under law requires the State to govern impartially. . . . The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). H.R. 3313 does not serve any legitimate governmental objective. Its object is to shield from federal judicial review a state's refusal to recognize marriages of same-sex couples lawfully performed in another state. This object is not a legitimate governmental interest because it "is born of animosity toward the class of persons protected," *i.e.*, lesbians and gay men. *See Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also* C*ity of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect") quoting *Palmore v. Sidoti* , 466 U.S. 429, 433 (1984)).

H.R. 3313 thus violates the principle that "a law must bear a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635. Like the Colorado amendment invalidated in *Romer*, H.R. 3313 "is a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate [governmental] interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* Like the Colorado amendment, H.R. 3313 "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* Neither Congress nor a state may "so deem a class of persons strangers to its laws." *Id.*

2. H.R. 3313 would effectively amend the Constitution without following the procedures of Article V.

In its report on Section 1738C, the House Judiciary Committee stated that it believed the provision to be a proper exercise of Congress's power under the Effects Clause – the second sentence – of the Full Faith and Credit Clause. *Id.* at 24-28. The Committee acknowledged, however, that no less an authority than Professor Tribe took the opposite view. *Id.* at 26-28. Wholly apart from the *Romer* considerations discussed above, Professor Tribe stated: "Congress possesses no power under any provision of the Constitution to legislate any such categorical exemption from the Full Faith and Credit Clause of Article IV." *See* 142 Cong. Rec. 13359, 13360 (reproducing letter from Professor Tribe to Senator Kennedy dated May 24, 1996).

H.R. 3313, however, would bar the federal courts from deciding the constitutional questions posed by Section 1738C – whether Congress may selectively deny effect to the Full Faith and Credit Clause, much less do so to enable states to effectuate anti-gay bias. Only state courts would be able to decide those questions. The proponents of H.R. 3313 obviously fear that federal courts, including the Supreme

Court, would invalidate Section 1378C. In contrast, the likelihood that a state court, freed from the disciplining prospect of Supreme Court review, would invalidate or restrictively interpret a federal law freeing the state from the strictures of the Full Faith and Credit Clause seems slight indeed. Thus, as a practical matter, by remitting consideration of the constitutionality of Section 1738C exclusively to state courts, H.R. 3313 likely renders it impervious to judicial invalidation. In thus shielding Section 1738C from judicial invalidation, H.R. 3313 would raise this statutory provision to the rank of a constitutional amendment.

Because H.R. 3313 "attempts substantively to redefine a constitutional guarantee," *Tennessee v. Lane*, 124 S. Ct. 1978, 1993 n.18 (2004) – *i.e.*, the Full Faith and Credit Clause of Article IV and, indirectly, the Equal Protection Clause of the Fourteenth Amendment – it could become law only by following the amendment process set forth in Article V of the Constitution, which "alone confer[s] the power to amend [the Constitution] and determine[s] the manner in which that power [can] be exercised." *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *see also Leser v. Garnett*, 258 U.S. 130, 137 (1922); *Hawke v. Smith (No. 1)*, 253 U.S. 221, 227 (1920).

It has become common for those dissatisfied with federal court rulings on controversial social issues to seek relief by removing the issues from the courts' consideration. Proponents of school prayer, and opponents of reproductive rights and school busing, have long sought legislation to bar the courts from considering these issues. H.R. 3313 seeks to change the Constitution by placing certain matters beyond the purview of the federal courts.

3. H.R. 3313 would violate the Supremacy Clause.

Article III of the Constitution provides that, in addition to the actions within its original jurisdiction, the Supreme Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art III, § 2, cl. 2. The Exceptions Clause does not empower Congress to disable the Supreme Court from enforcing the Supremacy Clause. H.R. 3313 attempts to do so: By precluding Supreme Court review of state court decisions concerning Section 1738C, H.R. 3313 would strip Section 1738C of its status as "the Supreme Law of the Land" and convert it, instead, into 51 separate state laws. For that further reason, H.R. 3313 is unconstitutional.

The Supremacy Clause, U.S. Const. art. VI, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supreme Court has stated:

> To secure state-court compliance with, and national uniformity of, federal law, the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the "supreme Law of the Land," *and their decisions are subject to review by this Court.*

McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 28-29 (1990) (emphasis added); *see id.* at n.12. "[I]t is 'inherent in the constitutional plan,'" the Court stated, "that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case." *Id.* at 30 (citation omitted); *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 166 (1999) (following *McKesson*).

The Court stated these principles in explaining why the Eleventh Amendment does not preclude Supreme Court review of state-court decisions on federal questions in actions against states. These principles, however, apply with equal force in explaining why the Supremacy Clause precludes Congress from preventing Supreme Court review of state-court decisions on other federal issues: absent Supreme Court review of a state-court decision on a federal issue, the issue would remain "federal" in name only, no longer "the Supreme Law of the Land."

By precluding Supreme Court review of state-court decisions concerning Section 1738C, H.R. 3313 creates the possibility that Section 1738C will be given one construction by the courts of some states, and a different construction by the courts of some other states, as well as the theoretical possibility that Section 1738C will be held valid by the courts of some states but invalid by the courts of others. Federal constitutional guarantees would depend entirely on geography, the antithesis of federal supremacy. The Framers foresaw the nightmare such a regime would produce; they did not mean the Constitution to permit it to occur. As Alexander Hamilton stated in Federalist 80: "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

4. H.R. 3313 would violate the principle of separation of powers.

In addition to scuttling federal supremacy, H.R. 3313 would repudiate the principle of separated and divided powers that forms the bedrock of our federal system. H.R. 3313 would do so by placing an Act of Congress beyond federal court review. There is no justification, however, for eroding the bedrock principle of our federal system that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see, e.g., Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may

not legislatively supersede [federal court] decisions interpreting and applying the Constitution." (invalidating federal statute purporting to overrule *Miranda v. Arizona*, 384 U.S. 486 (1966)).

5. H.R. 3313 would set a dangerous precedent.

If the advocates of H.R. 3313, when in the majority, may shield favored legislation from judicial invalidation by stripping the federal courts of jurisdiction to review that legislation, advocates of other causes, when in the majority, may similarly shield their own favored legislation from judicial invalidation by the same means. To use just three examples, H.R. 3313 would serve as a precedent for legislation

- prohibiting federal courts from hearing Commerce Clause challenges to federal laws, in reaction to such decisions as *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000);

- prohibiting federal courts from reviewing affirmative action programs, in an effort to shield such programs from judicial challenge or freeze into law the Supreme Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003); and

- prohibiting federal courts from entertaining Eleventh Amendment challenges to federal statutes, in reaction to such decisions as *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 627 (1999).

In short, H.R. 3313 would set what the Senate Judiciary Committee, in condemning President Roosevelt's court-packing plan called a "vicious precedent." The Committee stated:

> Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen against the Government itself, create the vicious precedent which must necessarily undermine our system? Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent court, a fearless court, a court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact.

S. Rep. No. 75-711, at 13-14 (1937).